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SUPREME COURT, U.S.

No. 05-593

In the Supreme Court of the United States

PAT OSBORN

Petitioner

v.

BARRY HALEY; GAYE LUBER; AND
LAND BETWEEN THE LAKES ASSOCIATION, INC.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

When a federal employee is sued in a civil action in a state court, the Westfall Act, 28 U.S.C. § 2679(d)(2), authorizes the Attorney General to remove the action to federal district court—and seek to substitute the United States as the party defendant in place of the employee—by certifying that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." As the court of appeals expressly acknowledged, this case presents two questions "that have split the circuits" for more than a decade, namely:

1. Whether the Westfall Act authorizes the Attorney General to certify that the employee was acting within the scope of his office or employment at the time of the incident solely by denying that such incident occurred at all.

2. Whether the Westfall Act forbids a district court to remand an action to state court upon concluding that the Attorney General's purported certification was not authorized by the Act.

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REPLY BRIEF FOR THE PETITIONER

Petitioner Ms. Pat Osborn respectfully files this reply brief in support of her petition for a writ of certiorari.

ARGUMENT

Both petitioner and the Solicitor General of the United States (on behalf of federal respondent Barry Haley) agree that the Court should grant review.* As explained in both the petition (at 6-9, 13-14) and the Solicitor General's brief (at 10-13, 17-18), there are persistent conflicts among multiple circuits as to both questions presented.

As to the first question, the First and Second Circuits take one view of the Attorney General's authority to issue "incident-denying" certifications under the Westfall Act, but the Third, Eighth, and D.C. Circuits (joined in this case by the Sixth Circuit) take a contrary view. While the Solicitor General observes (at 16) that "neither the First nor Second Circuit has revisited the issue in light of the subsequent decisions of the other courts of appeals," that fact only highlights the persistence of the conflict. Indeed, courts in the First and Second Circuits have continued to apply *Wood v. United States*, 995 F.2d 1122 (1st Cir. 1993) (Breyer, C.J.) (en banc), and *McHugh v. University of Vermont*, 966 F.2d 67 (2d Cir. 1992), *after* the conflicting decisions from other circuits. *See, e.g., Davric Maine Corp. v. United States Postal Service*, 238 F.3d 58, 66 (1st Cir. 2001) (applying *Wood*); *Day v. Massachusetts Air National Guard*, 167 F.3d 678, 686 (1st Cir. 1999) (same); *Bello v. United States*, 93 Fed. Appx. 288, 289-90 (2d Cir. 2004) (applying *McHugh*); *Asto v. Mirandona*, 372 F. Supp. 2d 702, 707 (E.D.N.Y. 2005) (same).

As to the second question presented, the parties agree that the First and D.C. Circuits take one view of the district court's authority to remand a Westfall Act action to state

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* The two private respondents, Gaye Luber and Land Between the Lakes Association, Inc., each waived the right to file a response to the petition.

court; the Third, Fourth, and Fifth Circuits (joined here by the Sixth Circuit) take a different view; and the Eleventh Circuit takes yet a third view. Although the parties might disagree about how the four dissenting Justices approached the remand issue in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), there can be no dispute that the issue was not definitively resolved in that case, leaving the three-way split described above. *See id.* at 437 (O'Connor, J., concurring in part and concurring in the judgment) (declining to join Part IV of the plurality opinion because "we should not resolve [the remand] question until it is necessary for us to do so").

The parties differ, of course, as to how these conflicts should be resolved on the merits, and those differences can be fully developed in merits briefs. But petitioner and the Solicitor General fully agree that this case is an appropriate vehicle for resolving the two Westfall Act issues that have divided the lower courts, repeatedly and in multiple ways, for more than a decade and a half.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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